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No. 90-1173

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In the Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC SERVICE COMPANY OF COLORADO, ET AL., PETITIONERS

v.

WILLARD A. THOMPSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer may be sued for defamation under state law for statements made in a disciplinary letter sent to an employee, where the court finds that the evidence does not establish that the disciplinary letter was required by the collective bargaining agreement.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case concerns the application of federal labor law to a defamation action filed by respondent Willard A. Thompson in Colorado state court against his employer, petitioner Public Service Company of Colorado, and his supervisor at the company, petitioner R.M. Richards. At the time of the dispute, respondent was represented by Local Union No. 111 of the International Brotherhood of Electrical Workers, which had a collective bargaining agreement with Public Service. Pet. App. 2a. Two separate incidents are at issue.

Respondent first claims that he was defamed by statements in a written notice sent to him by petitioner Richards on December 6, 1983. The letter informed re-

spondent that he was suspended for five days without pay for "poor work performance, creating a nuisance for customer employees and sexual harassment and/or unwanted contact of customer employees." Pet. App. 3a. A copy of the notice was sent to a limited number of management and union officials, and placed in respondent's personnel file. *Id.* at 4a. The collective bargaining agreement did not expressly require Public Service to provide written disciplinary notices. *Id.* at 25a-26a; Pet. 4 n.2.

Respondent challenged his suspension under the grievance mechanism established by the collective bargaining agreement. After a factual presentation to a joint union-management committee, the parties agreed to settle the dispute. Pet. App. 21a. The five-day suspension was reduced to two days, and the word "sexual" was removed from that portion of Richards' letter that accused respondent of "creating a nuisance for customer employees and sexual harassment and/or unwanted contact of customer employees." *Id.* at 3a, 4a. Respondent mounted no further challenge to the disciplinary suspension. *Id.* at 4a.

The second claim of defamation was based on a letter of reprimand issued to respondent by Richards on June 29, 1984. That letter (which was given the same limited circulation as the previous letter) accused respondent of "falsification" of his time card in claiming sick leave for June 5, 1984. Pet. App. 4a, 22a. According to Richards, respondent knew that he was required to have a doctor's excuse to be eligible for sick leave, and was aware that, by claiming leave without the required excuse, he had falsified the time card. *Id.* at 4a.

It is unclear whether respondent invoked the collective bargaining agreement's grievance procedures to protest this reprimand. Pet. App. 22a. Respondent did, however, take the reprimand directly to a third-level supervisor, who deleted the reference to "falsification." The revised letter of reprimand accused respondent of "malingering" and ignoring "required polic[ies] [and] procedures" in claiming sick leave on his time card. Respondent did not challenge the revised reprimand. *Id.* at 4a.

2. On December 3, 1984, respondent filed a state court complaint alleging that Richards' disciplinary notices defamed him. Pet. App. 4a, 22a-23a. In April 1987, the state trial court granted petitioners' motion for summary judgment. The court held that both disciplinary notices were protected by a qualified privilege under Colorado law. On the basis of exhibits and deposition excerpts, the trial court determined that there was no genuine issue as to actual malice and, accordingly, entered summary judgment in favor of petitioners. *Id.* at 28a-29a.

3. The Colorado Court of Appeals affirmed the district court's judgment on other grounds. The court of appeals decided that "national labor policy requires the recognition of an absolute privilege" for the letters of reprimand in issue. Pet. App. 24a-25a. The court accordingly concluded that federal labor law preempts the state law of qualified privilege otherwise applicable to these statements, and affirmed the dismissal of the action.

Relying on *General Motors Corp.* v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966), and *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), the court determined that an absolute privilege extends not only to statements made during grievance conferences or arbitration hearings but also "to written notices of discipline which 'trigger' the initiation of such proceedings." Pet. App. 25a. The court acknowledged that in *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d 536 (1987), the Ninth Circuit had ruled that the *Hasten* rule of absolute privilege is inapplicable to a notice of discipline not mandated by the collective bargaining agreement. In such circumstances, the *Tellez* court reasoned, such notice is not part of the "grievance process" required by the labor agreement. The Colorado appellate court nevertheless rejected the line drawn in *Tellez* and concluded that *Mendicki* and *Hasten* should be extended to the statements at issue even though "there is no evidence that the contract *required*" the notices of reprimand. Pet. App. 26a. The court of appeals further rejected the contention that petitioners had

abused their absolute privilege by publishing the two disciplinary notices to persons who did not have a legitimate interest in the dispute. *Id.* at 26a-27a.

4. The Colorado Supreme Court granted certiorari to consider whether "federal labor law, under the circumstances of this case, requires the recognition of an unqualified rather than a qualified privilege, as previously recognized by this court under state law with respect to statements similar to those made here." Pet. App. 5a. The court found that both the trial court and the court of appeals had erred, and reversed the entry of judgment in petitioners' favor.

a. With respect to the appellate court ruling, the state supreme court rejected the conclusion that, "under federal labor law, statements made by an employer in a notice of discipline may not be the basis of a defamation action." Pet. App. 2a. The court noted that, in *Churchey* v. *Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988), it had previously determined that an employer's statement that an employee had been terminated for dishonesty was protected by a qualified privilege under the Colorado state law of defamation. The *Churchey* privilege required the employee to prove that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] in reckless disregard as to its veracity." Pet. App. 5a. The Colorado Supreme Court then determined that, "under the facts of this case," federal labor law did not require preemption of the state defamation action governed by a qualified privilege. *Id.* at 6a.

First, the court rejected the argument that Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, preempted respondent's state tort defamation claim in its entirety. Applying the test in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the court determined that respondent's claim was "independent" of the contract, because each element of the claim "may be resolved without reference to the collective bargaining agreement." Pet. App. 12a. The court found

that the decisions in *Mendicki* and *Hasten*, which recognized an absolute privilege for certain statements made in the course of grievance proceedings, could not support preemption under Section 301 in this case because they were decided prior to *Lingle*. The court indicated that, to the extent these cases were based upon a Section 301 preemption analysis, their "continuing validity is questionable" after *Lingle*. Pet. App. 8a.

The state supreme court also rejected petitioners' contention that there was any other basis "under the rubric of 'national labor policy' " for protecting petitioners' communications under an absolute or unqualified privilege. The court reasoned that "existing Supreme Court precedent suggests that a qualified privilege suffices" to safeguard the interests of national labor policy. Pet. App. 13a. The court explained that, in *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), this Court decided that state law defamation actions arising from statements made during a union organizing campaign were not wholly preempted, and could instead proceed under the qualified privilege standard announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Because the court viewed the federal interest in free debate considered in *Linn* to be "quite similar to the federal interest in encouraging frank discussion in the context of a grievance proceeding or a disciplinary action," it found no basis for affording an absolute privilege for the communications in this case.[1] The court concluded that "a state law defamation action based upon [such] statements * * * may go forward when the state law

[1] At one point, the language of the opinion suggests that the Colorado Supreme Court was willing to *assume* for the purposes of its analysis that the statements in this defamation action were made "in a grievance or disciplinary proceeding" under a collective bargaining agreement. See Pet. App. 15a. The opinion does not make any finding to this effect, and does not take issue with the court of appeals' factual conclusion that the notices in issue were not required by the collective bargaining agreement or made during the course of a grievance proceeding.

recognizes a qualified privilege for [such] communications." Pet. App. 15a.[2]

b. With respect to the trial court ruling, the court found that summary judgment should not have been granted "under state law," because there was a "genuine issue of fact" concerning the existence of malice. Pet. App. 2a, 18a. Applying the summary judgment standards set forth in *Churchey*, *supra*, the court concluded that the affidavits and deposition excerpts established "that a genuine issue of fact exists with respect to whether Richards knew of the falsity of his statements or acted with reckless disregard as to the falsity of his statements contained in the letters in question." The court remanded the case for trial. Pet. App. 18a.

DISCUSSION

Petitioners concede that the Colorado Supreme Court "correctly applied the *Lingle* analysis" in concluding that "the determination of [r]espondent's defamation claims" does not require "an interpretation of the Collective Bar-

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[2] It does not appear that the parties have ever raised (Pet. (i)), or that the Colorado Supreme Court ever resolved (Pet. App. 5a), the question of the scope of any qualified privilege that may be required by federal labor law in the circumstances of this case. Rather, in applying the qualified privilege under Colorado law, the state supreme court noted that the state standard was "virtually indistinguishable from the standard approved by the Supreme Court" in *Linn*, as borrowed from *New York Times Co.* v. *Sullivan*, *supra*. Pet. App. at 14a.

The court would appear to be correct insofar as the definition of malice is concerned. However, the court did not address the question of whether the burden of proof applicable to the issue of malice would be the same under state and federal law. See *New York Times Co.* v. *Sullivan*, 376 U.S. at 285-286 (malice must be proved with "convincing clarity"); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (referring to *New York Times* "clear and convincing evidence" requirement). Since petitioner does not present the argument that the Colorado state law of qualified privilege is preempted in favor of a more protective qualified privilege under federal law, we refrain from addressing that issue.

gaining Agreement." Pet. 9-10. They nevertheless contend (Pet. 8-13) that the state defamation action in this case is completely preempted by "federal labor policy," because the grievance process established by a collective bargaining agreement cannot function properly unless participants enjoy an absolute privilege for defamatory statements relating to such proceedings. They assert that the need for this absolute privilege extends even to statements, such as those in issue here, that precede the employee's decision to invoke the grievance process established by the collective bargaining agreement, and that are not otherwise found to be mandated by the contract. Further, petitioners assert that review is required to resolve a conflict among state and federal courts on the question presented.

We disagree. Collective bargaining agreements typically establish procedures for resolution of employee grievances through various means, including settlement meetings, hearings conducted by labor-management committees, and binding arbitration. There is no dispute that the notices of reprimand at issue gave rise to a grievance that could be redressed through such contractual procedures. But the factual findings in this case do not establish that these disciplinary notices were also part of the grievance resolution process mandated by the collective bargaining agreement. Indeed, the state court of appeals found that the notices were not even required by the agreement as the first step in the grievance process. Pet. App. 26a.[3] The rule advanced by petitioners in this case would accordingly serve as a com-

[3] Petitioners concede that the collective bargaining agreement did not contain an express requirement that the employer send a written disciplinary notice, Pet. 4 n.2, but now suggest that the requirement for such notice was impliedly incorporated into the agreement by past practice. However, the Colorado Court of Appeals found that "there is no evidence that the contract *required* such a written notification" (Pet. App. 26a) and the Colorado Supreme Court was silent on the issue. We therefore consider the legal issue based upon the lower court's findings of fact.

plete bar to any state defamation action directed at a broad class of statements made in the course of an employment relationship.[4] Nothing in federal law or labor policy mandates this result, and it would be inconsistent with this Court's decisions.[5]

We recognize that some confusion exists in lower court decisions concerning the source and scope of privileges applicable to statements made during grievance hearings, arbitration, and other procedures pursuant to collective bargaining agreements.[6] Greater clarity in this broad area is plainly desirable. But none of those decisions has concluded that federal labor law absolutely bars a defamation action where, as here, the claim is based upon statements that are not part of the process prescribed by a labor contract, and where the claim can be resolved without interpretation of the collective bargaining agreement. Accordingly, we do not believe that review of this case is likely to provide the Court with the appropriate vehicle for resolving the issue that divides some of the lower courts: whether statements made in accordance with grievance procedures established by a collective bargaining agreement are absolutely privileged under federal

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[4] Complete preemption of the state law of defamation by federal labor law is conceptually distinct from an "absolute privilege" against liability for defamation. Preemption involves the displacement of a state cause of action by federal law, whereas an absolute privilege—which is sometimes recognized under state law for a narrow class of cases, see note 15, *infra*—is a defense to an otherwise valid cause of action. See R. Smolla, *Law of Defamation* §§ 8.02, 8.03 (1989); R. Sack, *Libel, Slander, and Related Problems* 268-278, 284-287 (1980). Because complete preemption and an absolute privilege—to the extent it applies—have the same effect of barring recovery for defamation, courts do not always distinguish between the two doctrines.

[5] Although we do not believe that an absolute privilege is required by federal law for the statements in issue here, we do not rule out the need for extending an absolute privilege to statements made in other contexts, such as in the course of a grievance hearing conducted under a collective bargaining agreement. See notes 13 & 15, *infra*.

[6] See pp. 15-16, *infra*.

labor law. Compare, *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), with *Ezekiel* v. *Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978). That issue simply is not presented on this record.

1. a. Insofar as the Colorado Supreme Court held that Section 301 of the LMRA does not preempt respondent's defamation claim, its decision was correct. Section 301, by its terms, provides federal jurisdiction over "[s]uits for violation of contracts" entered into by employers and organized labor. This Court has held that Section 301 preempts not only lawsuits to enforce the terms of collective bargaining agreements, but also claims that require interpretation of those agreements. As explained in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220 (1985):

> [W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law.

In *Lingle*, 486 U.S. at 401-412, the Court determined that an employee who had challenged her discharge under the grievance procedures of a collective bargaining agreement could also pursue a parallel state court action for wrongful discharge that required her to establish that she had been discharged in retaliation for filing a workers' compensation claim. *Id.* at 402, 407-409. The Court reasoned that Section 301 preempts a state cause of action if, and only if, resolution of the state law claim "require[s] construing the collective-bargaining agreement." 486 U.S. at 407. The Court concluded that, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent'

of the agreement for § 301 pre-emption purposes." *Id.* at 409-410. The Court found that the dispute resolution mechanism established by the collective bargaining agreement would not be impermissibly undermined by the availability of such parallel state damage actions. *Id.* at 411-413.

Petitioners' concession (Pet. 9-10) that the Colorado Supreme Court correctly applied *Lingle* is fatal to their argument that the preemptive force of Section 301 extends to respondent's defamation claims. Under *Lingle*, a state tort suit is not preempted merely because it relates to a dispute that can be resolved by methods established through a collective bargaining agreement.[7] Rather, the test is whether resolution of the claim requires interpretation of the agreement. Here, all parties agree that it does not; thus, Section 301 does not preempt this action.[8]

Contrary to petitioners' contention (Pet. 11), the Court's decision in *United Steelworkers* v. *Rawson*, 110

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[7] See, *e.g.*, *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983) (noting, by way of example, that "a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract"). Petitioners contend that *Lingle* would permit preemption of some state law actions that work too great an interference with the grievance process—even where interpretation of the contract was not required—but that rationale for preemption would not be implicated here. As explained below, pp. 13-14, *infra*, we do not believe that preemption or an absolute privilege is required for statements such as these to assure the proper functioning of the dispute resolution process.

[8] Under the rationale adopted by some courts, see pp. 13, 14-17, *infra*, which distinguish between communications that are mandated by the agreement and those that are not, the determination of whether an absolute or qualified privilege applies can require a court to look to the collective bargaining agreement. We do not believe that the need to resolve the threshold contractual issue of whether a communication is required by the agreement calls for preemption. This Court recognized in *Lingle*, 486 U.S. at 413 n.12, that collateral issues of contract interpretation arising in state actions can be resolved under federal labor law by state courts.

S. Ct. 1904 (1990) does not lead to a different result. In *Rawson*, the employee accused the union of negligently breaching its duty to conduct safety inspections of a mine. That duty "ar[ose] out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners." *Id.* at 1910. The Court explained that the union was not accused of violating any "duty of reasonable care owed to every person in society"; rather, its duty to inspect the mine had its source in the contract. *Id.* at 1910-1911. The Court concluded that the state law tort action against the union for negligent breach of duty was preempted by Section 301 because "the duty to the employee of which the tort is a violation is created by a collective agreement and without existence independent of the agreement." 110 S. Ct. at 1909.

The state tort claim in *Rawson* was not "independent" of the collective bargaining agreement "in the sense of 'independent' that matters for § 301 pre-emption purposes." *Lingle*, 486 U.S. at 407. Without referring to the union's agreement with the employer, it was impossible in *Rawson* to ascertain whether the union had breached any obligation to the employees. The state tort action thus could not be resolved without interpretation of the labor agreement itself. Here, in contrast, the employer's duty to refrain from defaming respondent does not stem from any contract between the parties; rather, it is a duty that is "owed to every person in society." *Rawson*, 110 S. Ct. at 1910-1911. The determination whether petitioners possessed such a duty—and, therefore, whether the duty was breached—can be made without referring to the contract at all.[9] There is, accord-

[9] Petitioners' assertion (Pet. 11) that their obligations "concerning the grievance procedure and issuing disciplinary notices arose out of the Collective Bargaining Agreement" is factually unsupported and, in any event, misses the mark. The duty that petitioners allegedly breached was not the contractually imposed duty to comply with the procedures for processing grievances, but, rather, the state-imposed duty not to injure respondent's reputation by know-

ingly, no basis for concluding that Section 301 mandates preemption of state defamation actions such as this one, which do not require interpretation of the collective bargaining agreement.

b. We do not share petitioners' view (Pet. 14-15) that the decision below conflicts with two decisions of the courts of appeals finding particular defamation claims preempted by Section 301. Our reasons are these: Application of *Lingle* is necessarily fact specific; both cases are factually distinguishable from the claim in issue; and the reasoning adopted by those circuits indicates that those courts would not hold that Section 301 preempts respondent's claims.

In *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989), the defamation claim was based on accusations of misconduct by the plaintiff's co-workers, which allegedly caused the plaintiff's discharge. The court determined that resolution of the defamation claim "would necessarily involve construction of the collective bargaining agreement to determine whether [the plaintiff] was wrongfully discharged." Since the defamation claim could not be resolved "without interpreting or analyzing the terms of the * * * agreement," the court concluded that it fell within the preemptive scope of Section 301 under this Court's decision in *Lingle*, *supra*. 876 F.2d at 624.

Although the Eighth Circuit correctly articulated the *Lingle* standard for determining preemption, we are less certain that the standard was correctly applied. A defamation claim in the employment context might well be preempted by *Lingle* in certain factual situations, but the Eighth Circuit did not explain how the validity of the plaintiff's discharge under the terms of the contract might affect the disposition of the defamation claim. It is clear, however, that the Eighth Circuit would not have found preemption under the present circumstances, where the

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ingly uttering falsehoods. A duty to speak can be imposed by a variety of agreements, but that does not excuse the speaker from the state law duty to speak in a manner that does not defame others.

parties concede that resolution of the claim does not require interpretation of the agreement. In any event, a possibly erroneous application of *Lingle* to a particular set of facts by a court of appeals would not, in our view, independently warrant review of this case.

Petitioners also contend (Pet. 14-15) that the Colorado decision is in conflict with *Shane* v. *Greyhound Lines, Inc.*, 868 F.2d 1057, 1063 (9th Cir. 1989), but that case presents an issue not decided here. In *Shane*, the court of appeals made an express finding that the collective bargaining agreement obligated the employer to send the employee the disciplinary notice that contained the allegedly defamatory statements, and the court based its finding of preemption on that fact. What is more, in an earlier case, the Ninth Circuit rejected the claim that Section 301 preempts a defamation action arising from statements in a suspension letter that was not mandated by the collective bargaining agreement. See *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d 536, 538-539 (1987). Because the state court found that there was "no evidence" that the notices in issue here were "required" by the collective bargaining agreement, the Ninth Circuit presumably would apply *Tellez*, not *Shane*, and hold that this claim is not preempted by Section 301.[10]

2. a. Because Section 301 completely preempts only those state law claims that cannot be resolved without reference to a collective bargaining agreement, that provision does not operate to bar the state defamation claims at issue here. We do not share petitioners' view (Pet.

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[10] See also *Hyles* v. *Mensing*, 849 F.2d 1213, 1215-1216, 1217 (9th Cir. 1988) (statements made in the course of a grievance hearing preempted by Section 301). The Section 301 analysis employed in *Shane* can be questioned. The fact that a communication is required by the collective bargaining agreement does not establish that resolution of the claim meets the *Lingle* test of required contract interpretation. See note 8, *supra*. However, there are not enough facts set forth in the *Shane* opinion to determine whether, under the rule in *Lingle*, interpretation of the labor contract was necessary to resolve the defamation claim.

6-9) that federal labor policy nevertheless requires that the state law of qualified privilege be displaced by an absolute privilege in this case. In our view, there is no basis for petitioners' assertion that absolute protection for disciplinary statements in the workplace is necessary for grievance and arbitration mechanisms to work effectively. A qualified privilege standard that requires a plaintiff to prove actual malice affords employers wide latitude in revealing the grounds for disciplinary action. We do not believe that the success of the grievance process depends upon a right to include knowing or reckless falsehoods in such communications.

Petitioners have not advanced any persuasive reason why a notice of reprimand is entitled to greater protection than the communications at issue in *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), or *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), where this Court held that the federal interest was sufficiently protected by adhering to a qualified privilege standard borrowed from *New York Times* v. *Sullivan*, *supra*. In those cases, the Court acknowledged that federal labor policy requires that parties be allowed substantial freedom to engage in vigorous speech in the course of an organizational campaign or union membership drive, but nevertheless found that preemption (and implicitly, an absolute privilege) was unnecessary to vindicate that policy. That result should control the outcome here.[11]

b. We also do not believe that the judgment of the Colorado Supreme Court is in conflict with the judgment of any other court. We recognize that some courts have held that certain types of communications made in the

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[11] Exposure to the costs of defending defamation actions can inhibit speech. But this Court has already determined that this rationale does not require preemption of defamation actions directed at statements made by employees in the course of concerted activity. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983). An employer should not be afforded greater protection in this context.

course of procedures prescribed by a collective bargaining agreement for the resolution of employment disputes are entitled to an absolute privilege under federal labor law. See, *e.g.*, *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274, 278 (10th Cir. 1981); *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1089, 1092 (Ala. 1988). It is also true as petitioners discuss (Pet. 13-16), that there is disagreement among certain decisions: some courts apply an absolute privilege to all communications made in the course of procedures required by the contract;[12] some have restricted the application of this absolute privilege to statements made in grievance hearings;[13] some suggest that an absolute privilege might never be required;[14] and some apply an absolute privi-

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[12] *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274, 278 (10th Cir. 1981) (applying absolute privilege to discharge letter that the employer was required to send under the collective bargaining agreement because "federal labor law and policy require the absolute privilege rule as to communications made within the context of proceedings provided for by the collective bargaining agreement and its provisions for a grievance machinery"); *Neece* v. *Kantu*, 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App.) (statements made in a letter that "constituted a disposition of plaintiff's grievance after a hearing" enjoy an absolute privilege), cert. denied, 507 P.2d 442 (1973).

[13] See *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1089, 1092 (Ala. 1988) (extending an absolute privilege, apparently under federal law, to statements made in the course of hearings to resolve a grievance, but applying qualified privilege to accusations made in an investigation prior to initiation of grievance proceeding) and *Reynolds Metals Co.* v. *Mays*, 547 So. 2d 518 (Ala. 1989) (telegrams to employees notifying them of disciplinary action and dismissal are protected only by a qualified privilege). See also *Sturdivant* v. *Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983) (absolute privilege protects communications by participants in labor arbitration proceedings); *Kloch* v. *Ratcliffe*, 221 Neb. 241, 245-248, 375 N.W. 2d 916, 919-921 (1985) (statements in investigatory hearing held pursuant to an agreement governed by the Railway Labor Act are absolutely privileged).

[14] See, *e.g.*, *Krasinski* v. *United Parcel Service, Inc.*, 124 Ill. 2d 483, 486-492, 530 N.E.2d 468, 469-472 (1988) (accusations of dis-

lege under state law.[15] But none is in conflict with the

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honesty prior to discharge, and in discharge notice required under contract, are actionable under *Linn/New York Times* qualified privilege standard); *Ezekiel* v. *Jones Motor Co.*, 373 Mass. 382, 385-388, 372 N.E. 2d 1281, 1284-1286 (1978) (statements made to grievance board "revealing grounds for [plaintiff's] termination" are entitled only to qualified privilege.)

[15] Absent superseding federal law, the state law of privilege controls in actions arising under state defamation law, whether in state or federal court. See Fed. R. Evid. 501 (state law of privilege applies in "civil actions * * * as to which State law supplies the rule of decision"). Some states effectively accord an absolute privilege, on independent state grounds, to certain communications in the employment context. See, *e.g.*, *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986) (defamatory communications to state unemployment compensation board absolutely privileged); *Sturdivant* v. *Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983) (absolute privilege for participants in arbitration adopted, in part, to protect court's new alternative dispute resolution machinery); *Rougeau* v. *Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. Ct. App. 1973) (unqualified privilege for statements made in connection with investigation of employee for theft of employer's property); *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1093-1094 (Ala. 1988) (defamatory communications between managerial employees concerning corporate business not actionable because not a "publication" under state law); Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 674 (1986) (discussing the jurisdictions that afford no defamation remedy for communications within the corporation itself).

Some courts have suggested that statements made in the course of grievance or arbitration proceedings are entitled to protection under the common law absolute privilege that applies to statements made in a quasi-judicial setting. See, *e.g.*, *Mock* v. *Chicago, Rock Island & Pac. R.R.*, 454 F.2d 131, 133 (8th Cir. 1972) (discussing the "absolute privilege" that may "attach[] to relevant statements made during administrative proceedings which are 'quasi-judicial' in nature"), and cases cited therein; *Kloch* v. *Ratcliffe*, 221 Neb. 241, 245, 375 N.W.2d 916, 919 (1985) (relying in part on state law cases recognizing absolute privilege for statements in connection with "quasi-judicial" proceedings to hold that statements in investigatory hearing held pursuant to an agreement governed by the Railway Labor Act are absolutely privileged); *Corbin* v. *Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393, 395-397 (D.S.C. 1968) (absolute privilege attaches to presentation of testimony and argument before a board of arbitrators in a private dispute).

result in this case: no court has recognized an absolute privilege under the general rubric of federal labor policy for communications not found to be required by the terms of the collective bargaining agreement, nor made in the course of grievance procedures established by the contract. See *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d at 538-539 (expressly declining to extend an absolute privilege to disciplinary notices "neither required by the collective bargaining agreement, nor a part of the grievance process").[16] Because the factual predicates for the decisions recognizing an absolute privilege are missing in this case, it cannot be said that the Tenth Circuit, or any other court, would decide this case differently.[17]

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[16] Petitioner cites *Fulghum* v. *United Parcel Service, Inc.*, 424 Mich. 89, 102-105, 378 N.W. 2d 472, 478-479 (1985) as recognizing an absolute privilege for an employer's accusations of dishonesty against an employee at the time of his suspension. The discussion on which petitioner relies is found in a concurring opinion, and did not command a majority of the court. See 424 Mich. at 92-93, 378 N.W.2d at 473.

[17] The petition in this case is interlocutory, since the Colorado Supreme Court denied petitioners' motion for summary judgment and remanded for trial. In the government's view, there is no jurisdictional obstacle to review of this decision, which would appear to qualify under an exception to the final judgment rule. See 28 U.S.C. 1257; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-486 (1975); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983). Nevertheless, it should be noted that if the Court declines to review the decision at this time, and if petitioners receive an adverse decision on the defamation claims after a full trial on the merits, they will have another opportunity to present their contentions to the Court in a petition for a writ of certiorari seeking review of the final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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